HOUSE OF LORDS SESSION 2005–06
**[2005] UKHL 68**

*on appeal from:[2004]1 FLR 876*

# OPINIONS

## OF THE LORDS OF APPEAL

## FOR JUDGMENT IN THE CAUSE

**Kent County Council (Appellants)**
***v.***
**G and others (FC) (Respondents)**

**Appellate Committee**

Lord Scott of Foscote
Lord Clyde
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance

**Counsel**

*Appellants*:
Charles Howard QC
Gemma Taylor
(Instructed by Sharpe Pritchard, agents for Secretary, Kent County Council)

*Respondents*:
Jonathan Cohen QC
Charles Hale
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**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

**Kent County Council (Appellants) *v.* G and others (FC) (Respondents)**

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## LORD SCOTT OF FOSCOTE

My Lords,

1. This appeal raises an important question about the extent of the court's power under section 38(6) of the Children Act 1989 to give directions for the "medical or psychiatric examination or other assessment of the child." Subsections (1) and (2) of section 38 enable the court to make an interim care order in respect of a child if satisfied there is reasonable ground for believing that the threshold criteria for making a care order or supervision order in respect of the child are satisfied (see section 31(2)). These criteria are, broadly speaking, that the child is likely to suffer significant harm and that the likelihood of harm is attributable to the standard of care of the child being lower than that which it would be reasonable to expect a parent to give.

2. As its name suggests an "interim" care order is a temporary order, applied for and granted in care proceedings as an interim measure until sufficient information can be obtained about the child, the child's family, the child's circumstances and the child's needs to enable a final decision in the care proceedings to be made. The applicant for an interim care order is nearly always the local authority that has instituted the care proceedings. Given its "interim" character it is not surprising to find that the duration of the initial interim order may not be longer than eight weeks. But it may then be renewed for a further period, not exceeding four weeks; a renewed order may itself be renewed but no renewal may be made for a period longer than four weeks. And on each renewal application the section 31(2) threshold for making an interim care order must be satisfied.

3. The temporary character of interim care orders is, therefore, clear and the information gathering process for the purposes of the final decision as to whether a care order should be made, and during which it might be necessary to maintain an interim care order in place, is intended to be completed speedily. In June 2003 the President of the Family Division, the Lord Chancellor and the Secretary of State handed down a Protocol for Judicial Case Management in Public Law Children Act Cases. The Protocol set a guideline of 40 weeks for the conclusion of care cases and the foreword to the Protocol emphasised that -

> "… Though a fair and effective process must intervene before a child is taken from its parents … it is essential that unnecessary delay is eliminated …"

The warning against unnecessary delay echoes the general principle expressed in section 1(2) of the Act. This is the context in which the intended scope of section 38(6) must be judged.

4. Section 38(6) provides that -

> "Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment."

I have had the advantage of reading in advance the opinion that has been prepared by my noble and learned friend Baroness Hale of Richmond. I agree with her conclusion that this appeal should be allowed and with her reasons for that conclusion, and, if I may say so, have found her opinion particularly valuable for its survey of the background to the 1989 Act and its examination of the reasons why subsection (6) was included in the statutory scheme for interim care orders. I respectfully agree with her that the principal purpose of the subsection was to enable the court to control, and therefore be able to limit, the number and type of examinations or assessments that a child who had become the subject of care proceedings could be required to undergo. The subsection seems to have become, however, by judicial development a vehicle for achieving a much broader purpose. The issue on this appeal is whether

that development represents a legitimate extension of the original statutory purpose or purposes of the subsection.

5. Lady Hale has set out in paragraphs 38 to 42 of her opinion the relevant facts of this case. I gratefully adopt and need not repeat them. I will use also the name, Ellie, that Lady Hale has, for the purposes of her opinion, attributed to the child who was the subject of the care proceedings.

6. It was not, I think, in dispute that the main purpose of the assessment in a residential unit at the Cassel Hospital, directed by the Court of Appeal for Ellie, her mother and her father, thereby reversing Johnson J's decision of 24 October 2003, was to ascertain whether by a continuing course of psychotherapy Ellie's mother could be sufficiently changed so as to be brought to a state in which it would be safe for her to have the care of Ellie. The local authority objected, as they had successfully done before Johnson J, to the making of this order. They said that the court had not power to give such a direction. The giving of directions for therapeutic treatment of a parent could not, they said, be brought within section 38(6). The Court of Appeal disagreed: [2004] 1 FLR 876. Thorpe LJ said, at para 48, that

> "The essential question should always be, can what is sought be broadly classified as an assessment to enable the court to obtain the information necessary for its own decision?"

7. My Lords I am unable to accept that Thorpe LJ's question represented a correct formulation of the question an affirmative answer to which would open the door to an exercise of the section 38(6) power. I do not doubt that the proposed therapeutic treatment that the mother was to receive, and an assessment of its effect on her and of her ability to benefit from it, was likely to constitute very valuable evidence informing the court's decision as to whether or not a final care order in respect of Ellie needed to be made. Nor do I doubt that a continuing assessment of the relationship between Ellie and her mother in the light of the continuing therapeutic treatment the mother was to receive would be similarly valuable. But that is not enough, in my opinion, to open the door to an exercise of the section 38(6) power. Section 38(6) is contemplating an assessment of the child. True it is that any meaningful assessment of a child may need to be, or include, an assessment of the child with his or her parents, or otherwise in a family context. As Lord

Browne-Wilkinson said in *In re C (A Minor)(Interim Care Order: Residential Assessment)* [1997] AC 489, 502

> "… it is impossible to assess a young child divorced from his environment. The interaction between the child and his parents or other persons looking after him is an essential element in making any assessment of the child."

But, to come within section 38(6), the proposed assessment must, in my opinion, be an assessment of the child. The main focus must be on the child. In the present case the main focus of the proposed residential assessment was not on Ellie. It was on her mother. The assessment was not, for example, for the purpose of seeing whether or not Ellie and her mother had become satisfactorily bonded with one another. It was common ground by the time the case came before Johnson J that they had. Nor was it for the purpose of assessing her parents' behaviour towards her (c/f *In re C*). Nor was there any question about Ellie's health that needed to be assessed. What was to be assessed was her mother's capacity for beneficial response to the psychotherapeutic treatment that she was to receive. Such an assessment, no matter how valuable the information might be for the purposes of the eventual final care order decision, could not, in my opinion, be brought within section 38(6).

8. Mr Cohen QC, counsel for the respondents, relied very heavily on dicta from the opinion of Lord Browne-Wilkinson in *In re C*. At p 500 Lord Browne-Wilkinson said that

> "Section 38(6) deals with the interaction between the powers of the local authority entitled to make decisions as to the child's welfare in the interim and the needs of the court to have access to the relevant information and assessments so as to be able to make the ultimate decision."

He added that it should be borne in mind that the court's function, in exercising its jurisdiction under the Act, was investigative and non-adversarial and at p 501 said this -

> "The purpose of subsection (6) is to enable the court to obtain the information necessary for its own decision, notwithstanding the control over the child which in all other respects rests with the local authority. I therefore approach the subsection on the basis that the court is to have such powers to override the views of the local authority as are necessary to enable the court to discharge properly its function of deciding whether or not to accede to the local authority's application to take the child away from its parents by obtaining a care order."

It is important, however, to bear in mind that *In re C* was a case in which a very young child had sustained serious injuries while in the care of his parents, injuries that the parents were unable satisfactorily to explain. The issue was whether an assessment of the child and his parents at a residential unit could be directed under section 38(6). The manner in which the respective parents behaved toward the child, particularly in stressful situations, was to be the subject of the proposed in-depth assessment (see p 497). The focus of the assessment was the parents' behaviour towards the child and Lord Browne-Wilkinson's dicta should be read with that in mind. He cannot be taken to have intended that a direction for an examination or assessment could be made under section 38(6) whenever any information about a parent useful to the court in deciding whether or not to make a final care order could or might thereby be obtained.

9. The distinction between an examination or assessment where the focus is on the child and one where the focus is elsewhere has been drawn in a number of cases post-dating *In re C. In re B* [1999] 1 FLR 701 was a case in which section 38(6) direction had been given. The court had directed that the parents of the child be offered therapeutic treatment which, it was hoped, would enable their child to be entrusted to their care. The Court of Appeal allowed the local authority's appeal. Thorpe LJ said that he had no doubt that counsel (Mr Munby QC, as he then was) was right in characterising the proposal "as essentially a programme of therapy for the parents with a view to improving their prospects of providing good parenting rather than a programme of assessment." (p 707).

He went on

> "Essentially Dr Baker was offering a treatment programme that would address the parents' disabilities rather than a programme to assess anything in relation to the child …"

And Hobhouse LJ (as he then was) commented at p 712 that

> "… there is a distinction to be drawn between matters which involve the child alone or the child/parent relationship on the one hand, and the parents alone on the other side. The former comes within the scope of the sub-section, the latter does not."

10. In *In re M (Residential Assessment Directions)* [1998] 2 FLR 371, 381 Holman J, after referring to Lord Browne-Wilkinson's conclusions in *In re C*, said this -

> "… it does seem to me that both the words of the section and the language of Lord Browne-Wilkinson nevertheless impose some limits on the extent of the court's powers. They are limited to a process that can properly be characterised as 'assessment' rather than 'treatment', although no doubt all treatment is accompanied by a continuing process of assessment. And they are limited to a process which bona fide involves the participation of the child as an integral part of what is being assessed."

I agree with the learned judge's analysis.

11. Holman J's decision in *In re M* and the Court of Appeal decision in *In re B* [1999] 1 FLR 701 were reviewed by the Court of Appeal in *In re D (Jurisdiction: Programme of Assessment or Therapy)* [1999] 2 FLR 632. In this case the trial judge had made an order under section 38(6) directing a programme of treatment of a drug-dependant mother at a residential unit. The programme included supervision and assessment of the mother's care of the child but focussed on the mother's problems and her drug addiction. The Court of Appeal allowed the local authority's appeal against the order. Thorpe LJ repeated his opinion expressed in *In re B* that a programme might be an "assessment" even if there were an ingredient of ancillary therapy but that a programme which was substantially therapeutic would not fall within section 38(6)

even if it involved some element of assessment (p 637C/D). Simon Brown LJ, as he then was, made the same point when he said that if the programme were "essentially one for treatment rather than one for assessment" it would fall outside the scope of section 38(6) (p 641B). I agree. On the other hand Auld LJ departed in my view from the statutory limits inherent in section 38(6) when he expressed the opinion that a section 38(6) direction for therapy to be offered to a parent could be justified if

> "… therapy in the short term may assist in assessing whether further therapy may produce a relevant change for the better, and thus be a useful guide to the court when considering the future of the child at the full care stage." (p 640G-H)

As it seems to me such a direction would lack the degree of focus on the child that section 38(6) requires.

12. Another case to which I should refer is *In re B (Interim Care Order: Directions)* [2002] 1 FLR 545. The local authority applied for an interim care order immediately the child, B, was born. A proposal was made for the mother and child to move from the maternity hospital to a residential placement at Beacon Lodge which, as I understand it, is a mother and baby home which provides help in improving parents' child care skills. But the local authority was not prepared to agree to this placement and the judge did not give a section 38(6) direction. The Court of Appeal allowed the appeal and gave the direction. Thorpe LJ, at para 24, said this about the proposed programme at Beacon Lodge :-

> "… one objective is to prepare women residents for independent motherhood by a process of advice, instruction and education. The assessment is ongoing and subject to continual review. Throughout assessment the mother will be made aware of areas of concern through regular key worker sessions in addition to normal contact with staff. The assessment focuses on the parents' ability to learn and develop adequate skills and, where appropriate, independent living skills would be taught. Whilst the main focus of the work is the child, it is recognised that it is frequently the needs of the mother which must be addressed in order to meet the needs of the child."

This passage, in my respectful opinion, illustrates the problem that is produced by trying to give section 38(6) a function that falls outside the statutory purpose. The learned Lord Justice refers to the focus of the assessment being on the parents' ability to develop their parenting skills but then goes on, inconsistently in my opinion, to say that the main focus of the work is the child. It is, of course, true that the end purpose of the work was to provide the child with good, or better, parents. But an assessment of the success of the programme in improving the parenting skills of the parents could not, in my opinion, be described as "an examination or assessment of the child". Thorpe LJ went on to refer to "an assessment of the attachment between mother and child and also of the capacity of the mother to respond to professional concerns" (para 25). As assessment of the former sort can, I agree, often be regarded as an assessment of the child for section 38(6) purposes, but, in my opinion, an assessment of the latter sort cannot.

13. Buxton LJ, in the same case, said, at para 36, that the court was given -

> "a very broad and generous power of determination in deciding what is appropriate and what is not appropriate in respect of the assessment of the child in the interim period."

That is no doubt true but a prior question is whether what is proposed is capable of being described as "an assessment of the child". What was proposed for the mother at Beacon Lodge was, in my opinion, not capable of being so described. It lacked the degree of focus on the child that section 38(6) requires.

14. The Cassel Hospital report dated 26 September 2003 contains a number of passages which make clear the purpose of the continuing residential programme for Ellie and her parents that Johnson J at the eventual hearing on 22 October declined to direct but that the Court of Appeal did direct. Paragraph 2 of the report refers to the Cassel's "strong recommendation that rehabilitation should be offered for this family." Paragraph 3.1 ends with the conclusion that

> "Much work still needs to be done in developing [the mother's] capacity to care and for the couple to develop

> their relationship enough to create a safe environment for [Ellie]."

Paragraph 3.2.1 ends, first, with the "conclusion" that

> "[The mother] has begun to show that she can be more in touch with her thoughts and feelings and accept responsibility for them. However this shift is recent and requires more therapeutic work before she could produce the good mothering she so much wants to give [Ellie] … [She] has to understand and manage her cognitive difficulties in such a way that she does not arouse excessive frustration and criticism in others."

and, finally, with the following "Recommendation" :-

> "The therapist recommends that [the mother] is given the opportunity to continue the therapeutic work started so that, with appropriate support, she and her partner can have the chance to parent [Ellie] and any future children."

It seems to me clear that the main purpose of the proposed programme was therapy for the mother in order to give her the opportunity of change so as to become a safe and acceptable carer for Ellie. This purpose, in my opinion, does not come within section 38(6) notwithstanding that the results of the programme would be valuable and influential in enabling the court to decide whether a care order in respect of Ellie should be made and that if the purpose were to be achieved it would very greatly benefit Ellie.

15. The Cassel report of 26 September 2003 had failed to answer certain specific questions to which Johnson J had sought answers. So by an order made on 2 October 2003 the hearing was adjourned to 22 October with a direction that the family were to remain at the Cassel Hospital until then. One of the problems that had arisen related to the funding of the family's continued residential assessment at the Cassel. The order recited that the Kent County Council had agreed in principle that it would be appropriate for the family to undergo treatment at the Cassel Hospital for a further four months with a view to implementing a rehabilitation in the community plan but that the Council were unwilling

to commit themselves to funding the proposed treatment. The order invited West Kent NHS and Social Care Trust (the NHS Trust) to file a statement setting out their decision about funding the proposed treatment. The matter was then to be reconsidered on 22 October 2003.

16. At the adjourned hearing before Johnson J on 22 October the question whether the programme of treatment and assessment at the Cassel Hospital should continue was addressed. The court had before it a further report, dated 15 October 2003, from the Cassel. This report, like the report of 26 September, was prepared by Dr Roger Kennedy. It made the point that "in clinical terms, there is little distinction between assessment and treatment" and went on to say that

> "The rehabilitation of such difficult families involves ongoing assessment in a way that is quite distinct from ordinary kinds of treatment; because the risks are potentially high and because the kind of work is very difficult; in order for rehabilitation to succeed, there has to be ongoing assessment at each of the various stages. It is not that easy to distinguish assessment from treatment, as such. There needs to be an assessment of sustainability of change" (p 4 of the report).

17. The good sense of what Dr Kennedy says is not challenged but an "ongoing assessment" for the very laudable and socially important purpose of rehabilitating "difficult families" cannot, in my opinion, be brought within section 38(6). That subsection has a much more limited purpose.

18. Johnson J, in his judgment, delivered on 24 October, referred to the Cassel Hospital reports and said that what was proposed fell very clearly on the side of therapy rather than assessment and that accordingly he had no power to give the section 38(6) direction that was sought. I think he was quite right. The main focus of the proposed programme was to improve the suitability of the mother as a responsible carer of Ellie. That falls outside the ambit of section 38(6).

19. The Court of Appeal reversed Johnson J's decision. Thorpe LJ said, in paragraph 33, that the totality of Dr Kennedy's evidence did not support the judge's conclusion on the scope of the court's powers under section 38(6). He went on -

> "The question was not whether what was proposed amounted to treatment but whether what was proposed, even if involving treatment, could still be described as an assessment …"

I disagree. The question, in my opinion, was not whether what was proposed could be described as an assessment but whether it could properly be described as an assessment of Ellie. The distinction between treatment and assessment may, as Dr Kennedy had said, be an unreal one in the context of a programme of continuing treatment and assessment. But the distinction between treatment of the mother and an assessment of the progress of that treatment on the one hand and an assessment of Ellie on the other hand is a real one. A programme focussed on the treatment and improvement of the mother and her parenting skills cannot, in my opinion, be regarded for section 38(6) purposes as an assessment of Ellie.

20. I want to add a word or two about the funding implications of section 38(6) directions. The statute does not identify on whom the cost of compliance with the directions is to fall. The effect of an interim care order is that for the time being the local authority becomes in loco parentis to the child. It is natural, therefore, to suppose that a direction by the court under section 38(6) for an examination or assessment of the child would have to be funded by the local authority or, to the extent that the costs can be treated as costs of the litigation, the costs could be apportioned between the parties by a costs order. But where there is a direction not simply for an examination or assessment of the child but for an assessment at a residential unit of the whole family, both parents and the child, or, perhaps in some cases, other very young children of the family as well, the responsibility of the local authority seems to me much less clear. Was section 38(6) really intended to enable the court to place the local authority under an obligation to fund a residential programme for the parents and child extending for many months? And the problem becomes, to my mind, the more stark where the main purpose of the programme is to provide treatment to one or other, or both, of the parents so as to improve their parenting skills. From where does the court derive its power to oblige the local authority to fund treatment for the parents? One would ordinarily expect that if medical or psychiatric treatment of a parent had to be funded it would be funded by the local NHS Trust. This, I am sure, was what was in Johnson J's mind when he issued the invitation in his order of 25 October to which I have referred. It was an *invitation* that he issued. It would be impossible to suggest that the court had had power under section 38(6)

to *direct* the NHS Trust to fund the programme of therapy for Ellie's mother.

21. Reference was made by Lord Browne-Wilkinson in *In re C* [1997] AC 489 to the investigative nature of the court's jurisdiction under the 1989 Act. A court discharging an investigative function can, I would suppose, direct one or other of the parties to supply particular information that is available to that party and would assist the court in reaching its decision. But whether the court's investigative function can enable it to require a local authority applicant in care proceedings to fund a course of treatment of the child's parent in order to obtain information useful to the court in reaching its final decision is another question. The cost of obtaining information or evidence likely to be useful for that purpose can, perhaps, be regarded as part of the costs of the litigation. So it might, perhaps, be possible for the burden of the funding, or some part of that burden, to be cast upon the Legal Services Commission ('the LSC') supporting the parent or parents in question (see the discussion of this matter by Ryder J in *Lambeth Borough Council v S and Others* [2005] EWHC 776 (Fam). These funding difficulties were raised with counsel in the course of the hearing before your Lordships but none had any clear answer to the problems. There probably is no clear answer that can be given.

22. However, following the conclusion of oral argument on this appeal counsel for the respondents made some further written submissions to your Lordships regarding the funding of residential assessments by the LSC from the Community Legal Fund. It appears that on 8 November 2005 the Children and Families Team at the LSC prepared a position statement regarding the extent to which the LSC would be prepared to contribute to such funding. The statement makes clear, first, that the LSC will *not* fund any element of treatment, therapy or training within a programme of assessment but, secondly, subject to that *will* fund the costs of an assessment, or a proportion thereof either agreed between the parties or determined by the court. So if the assessment involves no element of treatment etc the LSC will fund the whole cost of the programme, including accommodation and subsistence expenses.

23. It seems to me that the funding problems which the LSC's position statement is addressing provide some indication that the use made of section 38(6) in some of the cases to which I have referred, and in particular by the Court of Appeal in the present case, went beyond the purpose for which section 38(6) was intended and was not a legitimate

use of the subsection. The funding of the Cassel Hospital programme might have been voluntarily undertaken by the Council or by the NHS Trust or by the LSC. In the case of each of them a refusal could, subject to the essential control that the need to obtain the court's permission constitutes, have been challenged by an application for judicial review. And, if the application were successful, the proposed funder would have to think again. But if a programme of therapy for a parent with a view to improving his or her parenting skills, with or without continuous assessment of his or her progress, falls outside the scope of section 38(6), my present opinion, necessarily provisional as we have not had the advantage of full argument on the issue, is that the court would have no power to direct the local authority, or any other potential funder, to undertake the funding of the programme and that the LSC's statement of 8 November 2005 correctly reflects the legal position.

24. Finally, I must refer to the submissions based on the Human Rights Act 1998 that were made on behalf of the respondents. There is no dispute but that both Ellie and her parents have the right under article 8 of the Convention to "respect" for their "family life". Mr Cohen QC submitted, as I understood it, that this right placed the state, and the County Council as an emanation of the state, under a positive obligation to provide for Ellie's mother to have the benefit of the proposed therapeutic and assessment programme at the Cassel Hospital in order to provide Ellie and her family with the optimum chance of being able to live together as a family. He submitted that if section 38(6) were to be given a scope that did not extend to a direction that that programme be offered it would have deprived Ellie's parents, and would deprive other parents in a similar position, of the chance to demonstrate that fundamental changes could be made within the necessary timescale so that it would be safe for them to parent their child. That may be so but the proposition that the refusal of the court to make that direction, or the unwillingness of the Council, or, for that matter, the NHS Trust or the legal aid authorities, to fund its implementation, would have constituted a breach of Ellie's or the parents' article 8 rights cannot, in my opinion, be accepted. There is no article 8 right to be made a better parent at public expense.

25. For all these reasons, as well as those given by Lady Hale, I would allow this appeal. The parties have agreed that there be no order as to costs.

**LORD CLYDE**

My Lords,

26. I have had the opportunity of reading the speech which my noble and learned friend Baroness Hale has prepared. I agree with it and for the reasons there expressed would allow the appeal.

27. Plainly a broad and purposive construction is appropriate for section 38(6) of the Children's Act 1989. Thus the phrase "of the child" is to be understood as meaning the child in the context of his or her family, so that the investigation may extend to considering the capacity of a parent to care for the child. But whatever the range of the investigation it must still qualify as a "medical or psychiatric examination or other assessment" of the child.

28. The purpose of the subsection is to enable the court to receive guidance for the making of a decision on the application for a care order. That includes the matters on which it has to be satisfied under section 31(2). The investigation with regard to which the court may give directions appears from the statute to be focused on the current state of affairs. That can be seen in the use of the present tense in section 1(3)(e) and (f). It may include an understanding of the present capacity of the parent to overcome any present deficiency. So to an extent it may look to the future, but only as a matter of a current forecast. What does not seem to be envisaged is any continuing assessment over a period of months to follow the progress, if any, of the parent in improving his or her capacity to give proper care to the child or in reducing the risk to the child which led to the interim care order being sought at the outset.

29. That point is in my view supported by the intention of the statute that the process of examination or assessment should extend only over a relatively short period. The general approach is stated in section 1(2). The life of an interim assessment order under section 38 is only eight weeks with extensions of only four weeks. Under section 32(1) the court must draw up a timetable with a view to disposing of the case without delay. Correspondingly relatively short periods are envisaged for investigations in section 37(4) and for child assessment orders under section 43(5). It seems from the statute as if the process for obtaining care orders was intended to be rapid and usually to extend over no longer than some two or three months.

30. It may be tempting to suppose that the court should remain in control of the future management of the child. But while the regime introduced by Part IV of the Act gives the court power to make care orders and supervision orders it leaves the management of a child who is in care to the local authority. On the grant of a care order, whether interim or final, the local authority not only has a duty under section 33(1) to receive the child into its care but it also under section 33(3) assumes parental responsibility for the child. The court may not assume the mantle of responsibility which by its own order has been laid upon the shoulders of the local authority. In the present case the decision whether the course of treatment should be carried out in the Cassel or in the community was a matter for the parental responsibility of the local authority.

31. Plainly a distinction can be made as matter of language between what constitutes an assessment and what constitutes treatment. Moreover the two may co-exist. An institution directed to make an assessment may incidentally commence some form of treatment, if only to assess whether the case is susceptible to treatment. Treatment will often be accompanied by some form of assessment of the degree of success or failure as the treatment progresses. But without engaging in the terminological distinction it should be enough to recognise that the jurisdiction of the court is confined to obtaining information about the current state of affairs, including perhaps a forecast of what future progress might be possible, and does not extend to a continuing survey of the effects of treatment. Such a continuing oversight might, if the treatment is successful, lead to the termination of a care order, but it does not form part of the court's responsibility in deciding whether or not to impose such an order.

32. Having received the results of the examination or assessment which has been made under section 38(6) the court has then to decide how to dispose of the application for a care order. There may be occasions where there is a sound justification for prolonging the interim care order. But I do not read the statutory provisions as envisaging that the process can be prolonged by repeated interim orders, especially if they are granted as matter of administrative procedure and not of judicial decision. It is for the court to ensure that the application is processed without delay so that a decision can be reached whether or not the parental responsibility should as matters stand remain on the local authority or whether the continuation of such a position is not necessary for the safety of the child.

33. The granting of directions under section 38(6) is a matter of discretion for the judge and in exercising that discretion financial considerations may be relevant. But the costs involved should be nothing near the kind of expenditure which was in issue in the present case where the work involved the ongoing treatment and assessment of the mother over a period of months. Moreover when the respective responsibilities of the court and the local authority are correctly understood it does not seem to me that any issue of human rights arises.

**LORD WALKER OF GESTINGTHORPE**

My Lords,

34. I am in full agreement with the opinion of my noble and learned friend Baroness Hale of Richmond, which I have had the privilege of reading in draft. For the reasons given in her opinion I would allow this appeal and make the order which she proposes.

**BARONESS HALE OF RICHMOND**

My Lords,

35. The Cassel Hospital in Richmond, Surrey, is 'an NHS institution dedicated to the assessment and treatment of severely disturbed adults, young people and families who come from all over the United Kingdom' (Families Service Information Pack). The Families Service deals with a small number of multi-problem families where there has been a severe risk to a child's wellbeing. Assessment and treatment involve a challenging combination of psychoanalytic psychotherapy and psychosocial nursing. Not surprisingly, this takes time. After an initial phase of residential assessment, normally lasting for eight weeks, a family may move on to a three phase programme of rehabilitation. Not surprisingly, this is expensive. Because of its special reputation as a centre of excellence in this difficult field, families are referred from outside the West London area. Not surprisingly, their own local health or social services authorities may be reluctant to pay.

36. The legal issue before us is at first sight a comparatively simple one. In what circumstances may a court direct a local social services authority to pay for a family's admission to the Cassel hospital under section 38(6) of the Children Act 1989? This reads:

> "Where the court makes an interim care order, or an interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment."

37. Most of the extensive case law about this provision concerns the Cassel, but there are many other residential family centres and other resources around the country which specialise in the assessment and treatment of families with severe problems. Courts and everyone else involved in the sensitive and difficult work of protecting children from harm may be anxious to make use of their services in the hope that the drastic step of permanent separation of child and family can be avoided. The issue of general importance underlying the simple issue in this case is the proper division of responsibility between courts and local authorities in the protection of children.

*The facts*

38. The history of this family demonstrates only too well the complexity of the problems. I shall change all their names. The mother was born on 14 January 1979. She had her first child, John, on 13 September 1996, when she was still aged 17. Her relationship with John's father, Leslie, did not last long. Her next child, Richard, was born three months prematurely on 27 December 1998. After spending three months in hospital, he was discharged into the care of his mother and his father, Liam. Three months later, on 13 June 1999, Richard died of multiple non-accidental injuries. Care proceedings were brought to protect the first child, John, who was not yet three. The judge, Hogg J, was unable to decide which of Richard's parents was responsible for his death. She held that either could have caused the injuries and that the mother had not told the authorities all she knew about it. (Her decision was unsuccessfully appealed to the Court of Appeal: see [2001] 1 FCR 97.) The case came back before Johnson J, who decided that the mother presented too great a risk for John to be returned to her, despite the good

relationship between them. He was therefore placed with his father, Leslie. (That decision was also unsuccessfully appealed: see [2001] 1 FLR 872.) The mother then formed a new and much more promising relationship with the present father. Their daughter, Ellie, was born on 8 May 2003.

39. Because of the history, the local authority initiated care proceedings a few days later. At that stage, their care plan was to remove Ellie from her parents and place her for adoption with another family. However, they were persuaded to agree to a six to eight week period of assessment at the Cassel. An order directing this was made on 12 June 2003 and the family moved in on 23 June 2003. Ellie had throughout been looked after by her mother, who was breast-feeding her. A letter of instruction to the Cassel was agreed between the parties. Prime among the ten questions asked of them was to obtain an account of what had happened to Richard, an explanation for any inconsistencies between this and previous accounts, and an assessment of the mother's acknowledgement of and insight into the events which had led up to his death. The matter came back to court on 14 August 2003. The Cassel recommended a further six week assessment. This was opposed by the local authority because little if anything had been done to address those first three vital questions. Johnson J was persuaded to direct a further six to eight week period of assessment, at that stage making it clear that it would be the last.

40. During that period, the mother did begin to address the issues surrounding Richard's death and her emotional neglect of him. Dr Van Rooyen, a clinical psychologist instructed by the local authority, recommended continued individual and group psychotherapy for the mother, ideally in a residential setting where she could continue to care for her daughter, but otherwise in the community, while Ellie lived with her paternal grandmother and the mother visited for most of every day. The Cassel report strongly recommended that the family be offered rehabilitation, with intensive psychotherapy for the mother, which could best be done in a residential setting because of the nature of the anxieties involved and the risk to the child. At that stage, they envisaged a further six to nine months' in-patient treatment in the Cassel. But at a directions hearing on 2 October, this was reduced to four months, to which the local authority agreed in principle subject to funding. The mother was then seen by Dr Hirons, the consultant psychotherapist to the local NHS and Social Care Trust. Dr Hirons did not feel that the severity of the mother's mental health needs was such that she needed in-patient treatment. The Trust would not therefore be able to fund a further period at the Cassel. They would be able to consider a long term therapeutic

plan and offer some psychotherapy in the meantime. The local social services authority were also unwilling to fund a further period at the Cassel. Their care plan, which had evolved gradually from adoption to rehabilitation now took the form of the alternative suggested by Dr Van Rooyen.

41. The case came back before Johnson J on 24 October 2003. He held that he had no power to direct that the local social services authority fund a further period of in-patient treatment in the Cassel, because by this time what was proposed "falls very clearly on the side of therapy rather than assessment". However, the family remained in the Cassel because there was an immediate appeal. After a hearing in December, the court announced that the appeal would be allowed. In the judgment of the court handed down in January 2004 (see [2004] 1 FLR 876, 890, para 48), the Court of Appeal said this:

> "However, we do not consider that the trial judge should distil the essential question as: is what is proposed assessment or therapy? The essential question should always be, can what is sought be broadly classified as an assessment to enable the court to obtain the information necessary for its own decision?"

42. The issue for us, therefore, is whether on the true construction of section 38(6), that is indeed the "essential question" for the court. Before turning to it, however, we should record with joy that the family left the Cassel in April 2004 to live in their own home with a package of monitoring, therapy and support. Their rehabilitation in the community was so successful that no order was made at the final hearing of the care proceedings in July 2004. Ellie has therefore been able to live with her mother and father throughout her life. The cost to the local authority of their stay in the Cassel, however, was more than £200,000. They have appealed against the decision of the Court of Appeal as a matter of principle.

*In re C*

43. The correct construction of the phrase "medical or psychiatric examination or other assessment of the child" has already been considered by this House in *In re C (A Minor) (Interim Care Order: Residential Assessment)* [1997] AC 489. This House unanimously

decided that it should be given a broad construction, enabling the court to order "a joint assessment of the child and the parents, including the parents' attitude and behaviour towards the child" (per Lord Browne-Wilkinson at p 502) or "any assessment which involves the participation of the child and is directed to providing the court with the material which, in the view of the court, is required to enable it to reach a proper decision at the final hearing of the application for a full care order" (at p 504). In that case, the House was not concerned with any distinction between "assessment" and "treatment". But that has since become a controversial issue: see *Re M (Residential Assessment Directions)* [1998] 2 FLR 371, Holman J; *Re B (Psychiatric Therapy for Parents)* [1999] 1 FLR 701, CA; *Re D (Jurisdiction: Programme of Assessment or Therapy)* [1999] 2 FLR 632, CA; *Re C (Children)(Residential Assessment)* [2001] 3 FCR 164, CA; *Re B (Interim Care Order: Directions)* [2002] EWCA Civ 25, [2003] 1 FLR 545; and *BCC v L and Others* [2002] EWHC 2327 (Fam), Charles J.

*Courts and local authorities*

44. The interpretation of "assessment" raises the question of what it is that has to be assessed. This in turn raises the general question of the proper division of decision-making responsibility under the 1989 Act between courts and local social services authorities. This question has recently been considered by this House in *Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291. Lord Nicholls of Birkenhead identified a "cardinal principle" of the Act, that once a final care order was made, it is for the local authority to decide how to meet their parental responsibilities towards the child. The courts' powers to intervene are limited to their jurisdictions over contact between the child and her family while she is in care, over the continued existence of the care order, and to judicial review (to these may now be added an action under the Human Rights Act 1998 if the authority has acted or proposes to act in a way which is incompatible with the Convention rights of either the child or her parents).

45. Lord Nicholls explained that this was a deliberate departure from the previous position under the wardship jurisdiction of the High Court, where the court retained power to give directions to the local authority (the same applied to the matrimonial jurisdiction of divorce courts, but the powers of the juvenile courts, which heard the bulk of the care cases at the time, were more limited). He pointed out that this was the result of a deliberate and widely discussed policy decision made at the time (p 310, para 27).

46. He referred to the *Review of Child Care Law* (September 1985), which ultimately led to the public law provisions of the 1989 Act. This prompted by the Second Report of the House of Commons Social Services Committee on *Children in Care* (Session 1983-84, HC 360-I). On this issue, the Committee said this (at paras 66 – 67):

> "66. There is a strong current of opinion in some quarters that the courts in care proceedings are at present unduly restricted by limitations on their powers to legitimising, if not actually rubber-stamping, the decisions and plans of local authority social services departments. As a reaction to this, a groundswell of opinion has arisen to suggest that the court – preferably reconstituted as a 'family court' – should be involved to a far greater degree both in discussions on long-term plans for a child when an order of any sort is made, and subsequently supervising the implementation of such plans . . .
>
> 67. The general principle upon which we have based our consideration of the correct balance between the need for justice and the welfare interests of children is that the courts should make long-term decisions impinging directly on the rights and duties of children and their parents, and that the local authority or other welfare agency should make decisions on matters which, although they may be of equal or greater importance, are not susceptible to clear and unambiguous resolution."

47. The *Review of Child Care Law*, the report to ministers of an interdepartmental working party (of which I was a member) (1985) adopted this principle (at paras 2.22 – 2.26):

> "2.20. One of our guiding principles has been that the court should be able to determine major issues such as the transfer of parental rights and duties where there is or may be a dispute between parents and local authorities, while the management of the case should be the responsibility of the local authority. . .
>
> 2.23. The expertise of a court lies in its ability to hear all sides of the case, to determine issues of fact and to make a firm decision on a particular issue at a particular time, in accordance with the applicable law. It cannot initiate action to provide for the child, nor can it deliver the

> services which may best serve the child's needs. It is arguable that only if it were given the power to choose the precise placement of the child and the resources to ensure that a sufficient range of placements was made available, could a court realistically be given the function of undertaking regular reviews of the future of each child in care.
>
> 2.24. It is not only important that the reviewing body should itself have the power to deliver the care which it considers best for the child: it is also necessary that the body with day to day responsibility for the child should have a positive duty to 'take a grip on' the case and make firm and early decisions without the temptation to pass responsibility to another body."

As Lord Nicholls continued, at para 28:

> "The Children Act, embodying what I have described as a cardinal principle, represents the assessment made by Parliament of the division of responsibility which would best promote the interests of children within the overall care system. The court operates as the gateway into care, and makes the necessary care order when the threshold conditions are satisfied and the court considers a care order would be in the best interests of the child. That is the responsibility of the court. … Then it is the responsibility of the local authority to decide how the child should be cared for."

48. Thus the court's role is plain. It is not, as Jonathan Cohen QC put it in his eloquent submissions on behalf of Ellie and her parents, to decide whether or not a child is to live with her family. It is, as Charles Howard QC put it on behalf of the local authority, to decide whether or not to make a care order.

49. But the position on the ground is never as simple as that. As Lord Nicholls went on to explain (at paras 29 - 31), "the [care] system does not always work well". He referred to *People like Us*, the Report of the Review of the Safeguards for Children Living Away from Home, led by Sir William Utting (1997), and to *The Government's Response to the Children's Safeguards Review* (1998, Cm 4105), which launched the

"Quality Protects" programme. In his Foreword, Frank Dobson, Secretary of State for Health, explained how

> "the Utting Report . . painted a woeful tale of failure. Many children who had been 'taken into care' to protect and help them had not been protected and helped. Instead some had suffered abuse at the hands of those who were meant to help them. Many more had been let down, never given the attention they needed, shifted from place to place, school to school, and then turned out when they reached 16."

50. The courts are only too well aware of some of the problems in the care system, not least because they tend to see the problems rather than the successes. They also see those problems in the context of a legal system which has always tried, and is now required, to respect the rights of both parents and child to their family life together unless there are compelling reasons to interfere. Many in the family justice system can also recall the days before the 1989 Act, when the principal decision facing the court in wardship proceedings was not whether the child should be removed from the family, but whether to approve a long term placement with a view to adoption, rather than keep alive the hope of reuniting the child with her family. Since the early 1970s, social work practice, too, has quite rightly been concerned to plan a permanent future for the child, whether that lies at home with her family or elsewhere with another "forever family". No-one wants a child, especially a young child, to be left indefinitely in care, with no "real" parents other than a public authority.

51. Thus the courts have always been concerned to know about the local authority's plans for the child. The House of Commons Social Services Committee put it this way (1983-84, HC 360-I, para 70):

> "We would not want courts to delay a decision unduly, nor to use that power of delay to pressure local authorities into a course of action designed to satisfy the court rather than to suit the child. But the court is entitled to expect to be told an authority's general intentions on matters such as placement or parental access, and to base their choice between for example, a supervision order [or] a care order . . . to an extent on that information."

52. The 1989 Act itself strengthened the internal processes of care planning within local authorities, but it also gave added prominence to the care plan in the court's own decision-making. Under section 31(1) of the Act, the court cannot make a care or supervision order unless it is satisfied of the so-called "threshold conditions" relating to the risk of harm to the child if an order is not made. But this is just the threshold. When deciding what, if any order to make, the child's welfare is the paramount consideration (section 1(1)), having regard in particular to the "checklist" of factors relevant to her welfare (section 1(3)). But the court "shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all" (section 1(5)). At this stage, therefore, the court has to take out its crystal ball and seek to discern, so far as it can, what the future might hold for the child.

53. As Professor Judith Harwin put it in "Care Planning: an Inter-agency Endeavour: Observations", a paper given at the President's Inter-disciplinary Conference in September 1997 (see Thorpe and Clarke, eds) *Divided Duties, Care planning for children within the family justice system* (Family Law 1998), at p 85, "The care plan provides a framework for local authority case management and it delineates the goals to be achieved and the desired outcomes for the child." The Department of Health, *Children Act 1989 Guidance and Regulations*, volume 3, *Family Placements*, para 2.62, gave guidance on what the contents of a plan for the child should be. Research indicated that most authorities followed this, although not always as fully as the courts would have liked. But the 1997 President's conference also revealed that the courts still had concerns about their lack of control over the implementation of the care plan once a care order had been made and a corresponding concern that the plan should be as full, clear and precise as possible before the court was committed to making the order.

54. This latter concern was met by further guidance from the Department of Health, *Care Plans and Care Proceedings under the Children Act 1989* (Local Authority Circular LAC (99)29). But, as Sir William Utting had himself said when Chief Social Services Inspector, in his foreword to *Protecting Children, A Guide for Social Workers undertaking a Comprehensive Assessment* (the so-called "orange book" published in 1988), "Good practice requires that a social work action plan should be based on an assessment in which all relevant factors have been evaluated." These obviously include the identified needs of the child and the capacity of her parents, the wider family and the children's services to meet those needs. The "orange book" has since been replaced by the comprehensive guidance given in the Department's

*Framework for the Assessment of Children in Need and their Families* (2000).

55. This emphasis upon careful scrutiny of the care plan, formulated in the light of a comprehensive assessment of the child and her family, has inevitably put back the point at which the court is ready to make a final order and thus to relinquish control to the local authority. To return to Lord Nicholls in *In re S*, [2002] 2 AC 291, para 92:

> "When a local authority formulates a care plan in connection with an application for a care order, there are bound to be uncertainties. Even the basic shape of the future life of the child may be far from clear. Over the last 10 years problems have arisen about how far courts should go in attempting to resolve these uncertainties before making a care order and passing responsibility to the local authority."

56. He went to recount cases falling either side of the line: on the one hand, allowing a limited period of "planned and purposeful delay" before making the order (see *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290) and, on the other, where the uncertain outcome of parental treatment was a matter to be worked out after the care order was made, not before (see *In re J (Minors)(Care: Care Plan)* [1994] 1 FLR 253. He concluded (para 99) that:

> "Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future."

Further than that, he did not feel able to go.

57. In many cases, of course, the child will be the subject of an interim care order made under section 38(1) of the 1989 Act. This does not pre-judge the eventual outcome of the case, as the court has only to be satisfied that there are reasonable grounds for believing that that the threshold criteria for making a full care order are made out (see section

38(2)). Nevertheless, the legal effect while the order is in force is the same as a full care order (see section 31(11)). This means that the local authority have parental responsibility for the child and can determine the extent to which the parents are able to meet their own responsibility (see section 33(3) and (4)). Thus the child is fully protected but the court and the child's guardian remain fully involved in the case. This may contribute to the temptation to remain involved until much of the uncertainty referred to by Lord Nicholls has been resolved. But that temptation should be resisted if it conflicts with the "cardinal principle" and the equally important principle that delay in determining their future is bad for children.

*Delay*

58. To my mind, the link between the uncertainty referred to by Lord Nicholls and the problem of "delay" in care proceedings is clear. It is no surprise to find that care proceedings now take far longer than was envisaged when the 1989 Act was passed. As the Lord Chancellor's Department's *Scoping Study on Delay in Children Act Cases* (March 2002) pointed out,

> "24. When the Children Act 1989 was implemented in 1991, it was anticipated that it would take an average of 12 weeks for care cases to be resolved. This has proved over-optimistic and has rarely been realised in practice. . . By 1996 care cases were in fact taking 46.1 weeks from the time they started to the time of a final decision.
>
> 25. By the end of 2000, this figure had risen again to an **average** of 50.3 weeks, 4 times as long as the original projection and almost a year of a child's life. In 2001 the figure has reduced, but is still high at 47.1 weeks."

59. The 1989 Act has several provisions designed to minimise delay and ensure that the case is decided as quickly as possible. Section 1(2) of the 1989 Act requires the court "to have regard to the general principle that any delay in determining the question is likely to be prejudicial to the child's welfare". Section 32 requires a court hearing care proceedings to "draw up a timetable with a view to disposing of the application without delay" and enables it to give directions for ensuring that the timetable is kept. Section 38 lays down strict time limits for any compulsory intervention in the family, whether by way of an interim care order or an interim supervision order, before the case is finally

determined. The initial order can last for up to eight weeks, and the second order can last for four weeks from the end of that eight weeks, but further orders can only last for four weeks at a time (see section 38(4) and (5)). These time limits clearly reflect the expectation that the proceedings would normally last no longer than 12 weeks. The *Review of Child Care Law* recommended that interim orders should be available both before the threshold criteria were proved and afterwards, if the court required more information before deciding what order, if any, would be the most effective to safeguard the child's welfare. But it assumed that both the adjournment and the interim order should only be for 28 days, as "normally the presentation of the local authority's plans for the child should enable the court to determine at the time of the main hearing the effectiveness of the order which is contemplated" (para 17.22).

60. Experience has shown that this was always a forlorn hope. The latest attempt to tackle the problem is the *Protocol for Judicial Case Management in Public Law Children Act Cases* [2003] 2 FLR 719. The President, Lord Chancellor and Secretary of State for Education and Skills begin their foreword thus:

> "After over a decade of otherwise successful implementation of the Children Act 1989 there remains a large cloud in the sky in the form of delay. Delay in care cases has persisted for too long. The average care case lasts for almost a year. This is a year in which the child is left uncertain as to his or her future, is often moved between several temporary care arrangements, and the family and public agencies are left engaged in protracted and complex legal wranglings. "

The guideline is 40 weeks for the conclusion of care cases. The basis is that "a change in the whole approach to case management and a clarification of focus, among all those involved in care cases, is the best way forward."

*Section 38(6)*

61. It is against that background that Section 38(6) has to be construed. It is set out at paragraph 2 above. But it should not be construed in isolation from subsection (7):

> "A direction under subsection (6) may be to the effect that there is to be –
>
> (a) no such examination or assessment; or
>
> (b) no such examination or assessment unless the court directs otherwise."

As Lord Browne-Wilkinson said in *In re C,* at [1997] AC 489, 501

> "The Act should be construed purposively so as to give effect to the underlying intentions of Parliament. . . . The purpose of subsection (6) is to enable the court to obtain the information necessary for its own decision, notwithstanding the control over the child which in all other respects rests with the local authority."

62. As Lord Browne-Wilkinson pointed out, the power in subsections (6) and (7) to decide what "medical or psychiatric examination or other assessment" the child should undergo was a power to limit or control the parental responsibility which otherwise the local authority have for the child even under an interim care order (see sections 31(11) and 33(3)(a)). On the one hand, the court might insist that the child have such an examination or assessment even if the local authority did not want this. Otherwise, the local authority would be in control of what evidence about the child might be obtained and put before the court. This could well be unfair to the parents, whose power to meet their own responsibilities for the child can be determined by the local authority (see section 33(3)(b) and (4)). On the other hand, the court might put limits on the number and type of examinations or assessments which the child had to undergo, for example by insisting on a single report by a jointly instructed independent expert in cases of suspected non-accidental injury or sexual abuse.

63. The legislative history makes it clear that the latter was a principal, if not the principal, purpose of section 38(6) and (7). There was no reference to such a power in either the *Review of Child Care Law* (1985) or the White Paper on *The Law on Child Care and Family Services* (1987) (Cm 62). Nor did it feature in the draft Children Bill annexed to the Law Commission's Report on *Guardianship and Custody* (Law Com No 172, July 1988), which reflected the proposals both of the child care law review and of the Commission's review of the private law relating to children. But also important in the genesis of the Act was the *Report of the Inquiry into Child Abuse in Cleveland 1987*

led by Dame Elizabeth Butler-Sloss (July 1988) (Cm 412). The Inquiry was very concerned about the number of examinations by different doctors of the same child, more for the purpose of providing information for the adults than for the advantage of the child (para 11.45). It recommended that children should not be subjected to repeated medical examinations or repeated interviews solely for evidential purposes (p 245). It also recommended that the court should have to determine disputes over medical examination during the currency of an emergency protection order and to determine further medical examinations for evidential purposes after care proceedings were initiated (pp 252-253). It is fair to conclude that section 38(6) and (7) were inserted into the Act in response to these recommendations. The same is true of section 44(6), (7) and (8), which make virtually identical provision where an emergency protection order is in force.

64. The purpose of these provisions is, therefore, not only to enable the court to obtain the information it needs, but also to enable the court to control the information-gathering activities of others. But the emphasis is always on obtaining information. This is clear from the use of the words "examination" and "other assessment". If the framers of the Act had meant the court to be in charge, not only of the examination and assessment of the child, but also of the medical or psychiatric treatment to be provided for her, let alone for her parents, it would have said so. Instead, it deliberately left that in the hands of the local authority.

65. *A fortiori*, the purpose of section 38(6) cannot be to ensure the provision of services either for the child or his family. There is nothing in the 1989 Act which empowers the court hearing care proceedings to order the provision of specific services for anyone. To imply such a power into section 38(6) would be quite contrary to the division of responsibility which was the "cardinal principle" of the 1989 Act. (This is reinforced by the position in judicial review proceedings, recently considered by the House in *R(G) v Barnet London Borough Council* [2003] UKHL 57; [2004] 2 AC 208).

66. I appreciate, of course, that it is not always possible to draw a hard and fast line between information-gathering and service-providing. Some information can only be gathered through the provision of services. It may be necessary to observe the parents looking after the child at close quarters for a short period in order to assess the quality of the child's attachment to the parents, the degree to which the parents have bonded with the child, the current parenting skills of the parents,

and their capacity to learn and develop. That is the sort of assessment which was involved in *In re C* [1997] AC 489.

67. But the court only has power to insist where this is relevant to the questions which the court has to answer. Where the threshold criteria are in issue, it must be recalled that these are phrased (in section 31(2)) in the present tense: that the child "*is* suffering or *is* likely to suffer significant harm"; and "that the harm or likelihood of harm *is* attributable to" the quality of actual or likely parental care or to the child's *being* beyond parental control. Where the threshold is found or conceded but the proper order is in issue, the welfare checklist is likewise focussed on the present, for example, in section 1(3)(f): "how capable each of his parents . . . *is* of meeting his needs". The capacity to change, to learn and to develop may well be part of that. But it is still the *present* capacity with which the court is concerned. It cannot be a proper use of the court's powers under section 38(6) to seek to bring about change.

68. These conclusions are reinforced by the Act's emphasis on reaching decisions without delay. It cannot have been contemplated that the examination or assessment ordered under section 38(6) would take many months to complete. It would be surprising if it were to last more than two or three months at most. The important decision for the court is whether or not to make a care order, with all that that entails. But the care order is not the end of the story. The court retains jurisdiction over the contact between the child and his family (see section 34). The local authority has a duty to place the child with parents or other members of the family unless this is impracticable or inconsistent with the child's welfare (see section 23(6)). The court may sometimes have to accept that it is not possible to know all that is to be known before a final choice is made, because that choice will depend upon how the family and the child respond and develop in the future.

*Conclusion*

69. In short, what is directed under section 38(6) must clearly be an examination or assessment of the child, including where appropriate her relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to make under the Act with the minimum of delay. Any services which are provided for the child and his family must be ancillary to that end. They

must not be an end in themselves. In this case, the judge was clearly entitled to reach the conclusion that any further in-patient treatment in the Cassel had gone beyond what fell within his power to order under section 38(6). I would allow this appeal.

70. I would like to add two footnotes. First, I entirely accept that from a clinical point of view, these legalistic niceties are both unhelpful and unfair in the real world of trying to work with seriously disturbed families (see the discussion by Dr Roger Kennedy, Consultant Psychotherapist in charge of the Families Service at the Cassel, "Assessment and Treatment in Family Law – A Valid Distinction?" [2001] Fam Law 676). In an ideal world, the child's need for services such as the Cassel would be identified and the service provided. The only question for the court would be whether it should be provided voluntarily or under the auspices of some sort of court order. The problem is that the service needs funding and the local health trust and social services authority which have responsibility for the particular family involved may be unable or unwilling to fund it. That problem clearly requires a solution if the uniquely valuable service provided by the Cassel is to continue. But it is not permissible for the courts to try to solve the problem through a provision which was never designed for that purpose. It is sticking plaster at best and costly sticking plaster at that. We have not heard detailed argument upon whether or not the court has power to direct the local authority or any of the parties to fund the assessment. I would therefore prefer to express no concluded view on the issues raised in paragraphs 20 to 23 of the opinion of my noble and learned friend, Lord Scott of Foscote. But on the assumption that the court does have such power, the cost of any proposed assessment must be relevant to the court's decision whether or not to require the parties to provide it. However, it is inappropriate for the court to require detailed evidence from senior officers of such reluctant local authorities and insist that they prove a so-called "money defence" (cf. *Re C (Children)(Residential Assessments)* [2001] EWCA Civ 1305; [2001] 3 FCR 164, 172, para 31). Nor should we be tolerating a situation in which an hour's directions hearing, followed by a day's full hearing, are devoted to deciding whether or not to make a direction under section 38(6), as happened in this case.

71. Secondly, this case is about a course of action which everyone eventually agreed was in the child's best interests and so it has happily proved to be. But if the aims of the protocol are to be realised, it will always be necessary to think early and clearly about what assessments are indeed necessary to decide the case. In many cases, the local authority should be able to make its own core assessment and the child's

guardian to make an independent assessment in the interests of the child. Further or other assessments should only be commissioned if they can bring something important to the case which neither the local authority nor the guardian is able to bring. No-one denies that this was a particularly complex and difficult case in which expert psychological assessment of the risks was essential. But that is not always so.

72. For the reasons given earlier, together with those in the opinions of my noble and learned friends, Lord Scott of Foscote and Lord Clyde, I would allow this appeal.

**LORD MANCE**

My Lords,

73. I have had the opportunity of reading in draft the speeches prepared by my noble and learned friends Lord Scott of Foscote, Lord Clyde and Baroness Hale of Richmond. For the reasons that they have expressed in their judgments, with which I am in agreement, I am satisfied, firstly, that any assessment, ordered under section 38(6) of the Children Act 1986 by a court when making an interim care order, is intended to take place and be completed over a relatively short period, focusing on the current position of the child in that period; and that this is so, even though an element of treatment or therapy may, perhaps inevitably, also take place during that short period as a result of the engagement of and inter-action with the expert undertaking the assessment. What is not permissible under section 38(6) is the giving of directions for a longer process aiming at bringing about long-term change. Secondly, I agree that directions under section 38(6) can only be made if they can properly be described as being with regard to the medical or psychiatric examination or other assessment "of the child", rather than if they involve, as here, a programme focused in substance on the child's parent and the improvement of her parenting skills.

74. The judge's decision that the further period sought in the Cassel would not involve anything that could properly be described as an assessment within section 38(6) was in my view œrrect in law and unchallengeable on both these grounds, and I too would therefore allow this appeal.